

2005 NOV 18 PM 2:32

KELLY A. JOHNSON
United States Department of Justice
Environment and Natural Resources Division
Washington, D.C.

TIMOTHY M. BURGESS
United States Attorney
Anchorage, Alaska

MARK A. NITCZYNSKI
US Department of Justice
Environmental Defense Section
999 18th Street, Ste. 945
Denver, CO 80202
Phone: (303) 312-7388
Fax: (303) 312-7331

RICHARD L. POMEROY
Assistant United States Attorney
District of Alaska
Federal Building & U.S. Courthouse
222 West Seventh Avenue, #9
Anchorage, Alaska 99513
Telephone: (907) 271-5071

Attorneys for Plaintiff United States of America

**UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**CLARENCE ABELDGAARD, OCEANVIEW
ENTERPRISES, INC., CLOYD MOSER,
MODEB INVESTMENTS and GERALDINE
BARLING**

Defendants.

Case No. A-01-378 Civil (HRH)

SECOND AMENDED COMPLAINT

Plaintiff, the United States of America ("United States"), by authority of the Attorney General of the United States and through its undersigned counsel, acting at the request and on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), files

this Second Amended Complaint^{1/} and alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to Sections 309(b) and (d) of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 and the Water Quality Act of 1987 ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1319(b) and (d), to obtain injunctive relief and civil penalties against Clarence Abeldgaard, Oceanview Enterprises, Inc., Cloyd Moser, and Modeb Investments ("Defendants") for the discharge of dredged material, fill material, stormwater, and other pollutants to waters of the United States located near Anchor Point, Alaska, without authorization by either the United States Department of the Army or the United States Environmental Protection Agency ("EPA"), in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

2. In this action, the United States seeks: (a) to enjoin the discharge of pollutants into waters of the United States without a permit in violation of CWA section 301(a), 33 U.S.C. § 1311(a); (b) to require the Defendants, at their own expense and at the direction of EPA, to restore and/or mitigate the damages caused by their unlawful activities; and (c) to require the Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d).

JURISDICTION AND VENUE

3. This court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1345 and 1355 and CWA section 309(b), 33 U.S.C. § 1319(b).

4. Venue is proper in the District of Alaska pursuant to 28 U.S.C. §§ 1391(b) and (c), 1395(a), and CWA section 309(b), 33 U.S.C. § 1319(b). The subject property is located in this District. The causes of action alleged herein arose in this District. Defendants own and

^{1/} The United States filed the First Amended Complaint in July, 2002. As discussed below, this Court entered a consent decree on the First Amended Complaint as to Cloyd Moser and Modeb Investments on July 6, 2005. That consent decree was intended to constitute a complete and final settlement of the United States' Clean Water Act claims against Cloyd Moser and Modeb Investments set forth in the First Amended Complaint, and does not address the United States' claims against Clarence Abeldgaard, Oceanview Enterprises, Inc. or Geraldine Barling.

maintain portions of the subject property and reside in this District.

5. The United States has notified the State of Alaska of the commencement of this action. That notice is in accordance with CWA section 309(b), 33 U.S.C. § 1319(b).

THE PARTIES

6. The Plaintiff in this action is the United States of America. Authority to bring this action is vested in the United States Department of Justice by 28 U.S.C. §§ 516 and 519, and CWA sections 309 and 506, 33 U.S.C. §§ 1319 and 1366.

7. Defendant Clarence Abeldgaard is an individual whose primary residence is in Homer, Alaska. Clarence Abeldgaard is the president of Oceanview Enterprises, Inc. Clarence Abeldgaard and his wife, Geraldine Barling, own 100 percent of the company's stock.

8. Defendant Oceanview Enterprises, Inc. ("Oceanview") is an Alaska corporation engaged in property development and construction activities on Alaska's Kenai Peninsula.

8a. Defendant Geraldine Barling is an individual whose primary residence is in Homer, Alaska. Gerladine Barling is the wife Clarence Abeldgaard and is the only officer and only shareholder of Oceanview other than Clarence Abledgaard.

9. Defendant Cloyd Moser is an individual whose primary residence is in Anchorage, Alaska. Cloyd Moser and his son own a controlling share of Modeb Investments. Cloyd Moser controls the day-to-day development decisions of Modeb Investments.

10. Defendant Modeb Investments is an Alaska general partnership engaged in the property development business in and around Anchorage, Alaska.^{2/}

11. At all times relevant to this Second Amended Complaint, the Defendants either

^{2/} On July 6, 2005, the Court entered the Consent Decree With Defendants Cloyd Moser and Modeb Investments ("Consent Decree"), which was "intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the First Amended Complaint" against Cloyd Moser and Modeb Investments, based on their future performance of obligations under the Consent Decree. Under the Consent Decree, this Court retains jurisdiction over the action against Mr. Moser and Modeb "in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of [the] Consent Decree."

owned or controlled the real property that is the subject of this Complaint and/or otherwise directed, controlled or performed the activities that occurred on the real property that is the subject of this Complaint.

STATUTORY AND REGULATORY REQUIREMENTS

9. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344, or by a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

10. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment. CWA section 402, 33 U.S.C. § 1342, authorizes the Administrator of EPA to issue NPDES permits for other types of pollutants.

11. CWA section 502(12), 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

12. CWA section 502(6), 33 U.S.C. § 1362(6), defines “pollutant” to include, inter alia, dredged spoil, rock, sand and cellar dirt.

13. CWA section 502(7), 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

14. 33 C.F.R. § 328.3(a) and 40 C.F.R. §§ 122.2 and 232.2 define “waters of the United States” to include “tributaries” of waters that “may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide” as well as “wetlands adjacent to” such tributaries.

15. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define “wetlands” as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

16. CWA section 502(14), 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

17. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation, [or] partnership."

18. CWA section 402(p), 33 U.S.C. § 1342(p), specifies that a NPDES permit is required for any storm water discharge "associated with industrial activity."

19. 40 C.F.R. § 122.26(b)(14)(x) defines "storm water discharge associated with industrial activity" to include discharges associated with construction activity, including clearing, grading, and excavation resulting in the disturbance of at least five acres of total land area.

20. Pursuant to 40 C.F.R. § 122.26(c), dischargers of storm water associated with industrial activity are required to apply for an individual or group NPDES permit or to seek coverage under a storm water general permit.

21. EPA has issued a Construction General Permit ("Construction General Permit") pursuant to Section 402 of the Act, 33 U.S.C. § 1342. The Construction General Permit became effective on February 17, 1998 and authorizes certain discharges of storm water associated with construction activities. The Construction General Permit's coverage extends to all facilities in the State of Alaska, except those on Indian lands, and requires that permittees comply with the conditions and requirements set forth in the permit.

22. Part I.C. of the Construction General Permit states that, in order for storm water discharges from a construction site to be authorized, the discharger must first submit a Notice of Intent in accordance with the form and content requirements set forth in the permit itself.

23. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA sections 301(a), 33 U.S.C. § 1311(a).

24. CWA section 309(d), 33 U.S.C. § 1319(d), authorizes the commencement of an action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C.

§ 1311(a), CWA section 308 33 U.S.C. § 1318, or any order issued pursuant to CWA section 309(a). 33 U.S.C. § 1319(a).

GENERAL ALLEGATIONS

25. Each Defendant is a "person" within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

26. Stariski Creek is a tributary of Cook Inlet, which is subject to the ebb and flow of the tide.

27. Approximately 19,600 linear feet (or 3.7 miles) of Stariski Creek flows through and adjacent to three subdivisions near Anchor Point, Alaska: Stariski Meadows, Piper's Haven and the Happy Valley 5 Acre Homesites (hereinafter collectively referred to as the "Stariski subdivisions").

28. A substantial portion of the Stariski subdivisions contains wetlands.

A. Discharges of Dredged and Fill Material

29. Beginning in 1997, one or more Defendants, and/or persons acting on their behalf, have used heavy earthmoving equipment to place large quantities of slash debris, dirt and gravel fill, and other discharged materials into more than ten acres of the wetland located within various sites contained within the Stariski subdivisions. The locations at which these Defendants have materials into wetlands include, but are not limited to:

- a. Rowen Circle Road and Rowen Street within Stariski Meadows subdivision;
- b. Stariski Meadows Tax Parcel 159-200-82;
- c. Piper's Haven Tax Parcel 159-201-06;
- d. on both sides of Sergeant Avenue, within Piper's Haven Tax Parcels 159-201-09 and -12;
- e. Stariski Meadows Tax Parcel 159-200-88;
- f. Piper's Haven Tax Parcel 159-201-14;
- g. Sergeant Avenue, east past its intersection with Pepper Road;

- h. Pepper Road, north past Tax Parcel 159-140-43;
- i. Stariski Meadows Tax Parcel 159-200-87;
- j. the access road linking Pepper Road and Happy Valley 5 Acre Homesites subdivision between sections 20 and 29.;
- k. Piper's Haven Tax Parcel 159-20-107;
- l. Piper's Haven Tax Parcel 159-20-113; and
- m. the access road adjacent to Happy Valley 5 Acre Homesites Tax Parcels 159-23-057 and 159-23-055 and a slash debris burial pit within Tax Parcel 159-24-009.

30. In addition to the discharge of material at the sites described in paragraph 29 above, at times between March through May 2001, one or more Defendants and/or persons acting on their behalf, have used heavy earthmoving equipment to place slash debris, dirt and gravel fill, and other materials into wetlands located at Tax Parcels 159-20-108, 159-20-112, and 159-20-113 within the Stariski subdivisions.

31. In addition to the discharge of material at the sites described in paragraphs 29 and 30 above, on or about July 31, 2001, one or more Defendants, and/or persons acting on their behalf, used heavy earthmoving equipment to place dirt and gravel fill and other materials into wetlands located on or near the boundary between Tax Parcels 159-20-087 and 159-20-111 within the Stariski subdivisions.

32. The discharges into wetlands at the Stariski subdivisions identified in, but not limited to, subparagraphs a., b., g., and h. of paragraph 29 above were undertaken by Defendants Clarence Abeldgaard and Oceanview, at the direction, under the supervision and/or with the authorization of Cloyd Moser and Modeb Investments.

33. The heavy equipment used for the discharges of material into the wetlands identified in paragraphs 32, 33, and 34 above are "point sources" within the meaning of CWA section 502(14), 33 U.S.C. § 1362(14).

34. The wetlands into which material was discharged as identified in paragraphs 29,

30, and 31 above are adjacent to Stariski Creek.

35. Both Stariski Creek and the wetland areas of the Site are "waters of the United States" within the meaning of CWA section 502(7), 33 U.S.C. § 1362(7), and 33 C.F.R. § 328.3(a), 40 C.F.R. § 232.2, and 40 C.F.R. § 122.2.

36. The slash debris, dirt and gravel fill, concrete, and other materials discharged into wetlands as described in paragraphs 29, 30 and 31 above consisted of "dredged or fill material" within the meaning of CWA section 404, 33 U.S.C. § 1344, and "pollutant[s]" within the meaning of CWA section 502(6), 33 U.S.C. § 1362(6).

37. Defendants did not obtain a permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344.

38. On January 27, 2000, pursuant to CWA section 308, 33 U.S.C. § 1318, EPA sent an information request to Defendants Clarence Abeldgaard and Oceanview. In relevant part, this Section 308 information request asked these Defendants to answer certain questions about the Stariski subdivisions and the discharges there within thirty days of their receipt of the request. Defendant Clarence Abeldgaard received this Section 308 information request on February 11, 2000.

39. Clarence Abeldgaard and Oceanview have never submitted to EPA any response to this January 27, 2000 Section 308 information request.

40. On December 1, 2000, EPA issued Clarence Abeldgaard and Oceanview an administrative order pursuant to CWA section 309(a), 33 U.S.C. § 1319(a). In relevant part, the order requires Abeldgaard and Oceanview to "cease all discharges of dredged material, fill material, and other pollutants to: (i) Stariski Creek; (ii) the wetland areas of the Site; and (iii) any other waters of the United States." Abeldgaard received this order in early December 2000.

41. Clarence Abeldgaard and Oceanview have not complied with the December 2000 administrative order. The discharges into wetlands identified in paragraphs 30 and 31 above violate the terms of this order.

B. Discharges of Storm Water

42. Since 1997, Defendants have either directed, supervised, and/or authorized or participated directly in construction activities at the site (including grubbing, clearing, grading, filling, and excavation activities) that have resulted in the disturbance of greater than five acres of total land area.

43. These construction activities have resulted in the discharge of "storm water associated with industrial activity" to wetlands located within the Stariski subdivisions. This storm water has been conveyed through ditches, culverts, swales, gullies, and channels through disturbed areas of the site and has been contaminated with sand, dirt, sediment, suspended solids, and turbidity.

44. The sand, dirt, sediment, suspended solids, and turbidity discharged into wetlands as described in paragraph 46 constitute "pollutant[s]" within the meaning of CWA section 502(6), 33 U.S.C. § 1362(6).

45. The ditches, culverts, swales, gullies, and channels discharging pollutants as described in paragraph 46 constitute "point source[s]" within the meaning of CWA section 502(14), 33 U.S.C. § 1362(14).

46. At no time have Defendants submitted a Notice of Intent to obtain coverage under the Construction General Permit. Nor have Defendants made application for an individual or group NPDES permit for activities at the site.

FIRST CLAIM FOR RELIEF: UNAUTHORIZED DISCHARGES OF DREDGED AND/OR FILL MATERIAL BY CLARENCE ABELDGAARD, OCEANVIEW, CLOYD MOSER, AND MODEB INVESTMENTS

47. Paragraphs 1 through 46 are realleged and incorporated herein by reference.

48. By causing such dredged and/or fill material to enter waters of the United States, Defendants have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the CWA, 33 U.S.C. §§ 1311 and 1362(12).

49. Defendants' discharge of dredged and/or fill material was not authorized by any

permit issued pursuant to section 404 of the CWA, 33 U.S.C. §1314, and Defendants are therefore in violation of section 301 of the CWA, 33 U.S.C. § 1311.

50. Each discharge at each site at which such material was discharged into waters of the United States constitutes a separate violation, and each day the material remains in the wetlands without the required permit constitutes an additional day of violation of section 301 of the CWA. Pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19, each Defendant is liable for civil penalties for each violation.

**SECOND CLAIM FOR RELIEF: VIOLATION BY ABELDGAARD AND OCEANVIEW
OF SECTION 308 INFORMATION REQUEST**

51. Paragraphs 1 through 50 are realleged and incorporated herein by reference.

52. Defendants Clarence Abeldgaard and Oceanview have violated and are in violation of CWA section 308, 33 U.S.C. § 1318.

53. These Defendants' violations include, without limitation, an ongoing failure to respond to the information request issued by EPA pursuant to Section 308 on January 28, 2000.

54. Pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19, Defendants Clarence Abeldgaard and Oceanview are liable for civil penalties for each violation of Section 308.

**THIRD CLAIM FOR RELIEF: VIOLATION OF COMPLIANCE ORDER
BY ABELDGAARD AND OCEANVIEW**

55. Paragraphs 1 through 54 are realleged and incorporated herein by reference.

56. Defendants Clarence Abeldgaard and Oceanview have violated and are in violation of an administrative order issued by EPA under CWA section 309(a), 33 U.S.C. § 1319(a).

57. These Defendants' violations include, without limitation, an ongoing failure to comply with the requirement in the administrative order issued on December 1, 2000, that Defendants Abeldgaard and Oceanview "cease all discharges of dredged material, fill material, and other pollutants to: (i) Stariski Creek; (ii) the wetland areas of the Site; and (iii) any other waters of the United States." Defendants Abeldgaard and Oceanview, committed these

violations by, among other things, discharging dredged and/or fill material at various locations within the Stariski subdivisions as described in paragraphs 30 and 31 above.

58. Pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19, Defendants Clarence Abeldgaard and Oceanview are liable for civil penalties for each violation of this administrative order.

FOURTH CLAIM FOR RELIEF: UNAUTHORIZED DISCHARGES OF STORM WATER BY CLARENCE ABELDGAARD, OCEANVIEW, CLOYD MOSER, AND MODEB INVESTMENTS

59. Paragraphs 1 through 58 are realleged and incorporated herein by reference.

60. By causing storm water to enter waters of the United States as described in paragraphs 42-46, Defendants have engaged, and are continuing to engage, in the "discharge of pollutants" from a point source within the meaning of sections 301 and 502(12) of the CWA, 33 U.S.C. §§ 1311 and 1362(12).

61. Defendants' discharge of storm water was not authorized by any permit issued pursuant to section 402 of the CWA, 33 U.S.C. § 1342, and Defendants are therefore in violation of section 301 of the CWA, 33 U.S.C. § 1311.

62. Each day that such storm water is discharged without the required permit constitutes an additional day of violation of section 301 of the CWA. Pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19, each Defendant is liable for civil penalties for each violation.

FIFTH CLAIM FOR RELIEF: PIERCING THE CORPORATE VEIL OF OCEANVIEW

63. Paragraphs 1 through 62 are realleged and incorporated herein by reference.

64. Since the incorporation of Oceanview, Clarence Abeldgaard and Geraldine Barling have been the sole shareholders and officers of Oceanview

65. Clarence Abeldgaard and Geraldine Barling have failed to respect the separate identity of Oceanview by, among other things: failing to observe corporate formalities; abusing the corporate entity; commingling personal funds (including funds of proprietorships owned by Geraldine Barling) with those of Oceanview; treating the assets of Oceanview as their own; and

failing to provide and maintain adequate capitalization for Oceanview.

66. Failure to pierce the corporate veil of Oceanview would result in great injustice to the United States by allowing Oceanview, Clarence Abeldgaard and Geraldine Barling to circumvent the CWA. Clarence Abeldgaard and Geraldine Barling have sought to provide wholly inadequate remedies for the CWA violations at issue in the Second Amended Complaint by improperly seeking to hide behind the corporate veil of Oceanview and improperly removing assets from Oceanview.

67. Clarence Abeldgaard and Geraldine Barling have misused the corporate form of Oceanview in an effort to perpetrate a fraud by improperly seeking to hide behind the corporate veil of Oceanview and improperly removing assets from Oceanview.

68. Based on piercing the corporate veil of Oceanview, Clarence Abeldgaard and Geraldine Barling are personally liable for the relief from to be awarded to the United States in this action from Oceanview.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, requests that the Court enter judgment on behalf of the United States and against Defendants as follows:

That the Defendants be permanently enjoined from discharging or causing the discharge of dredged or fill material, storm water associated with industrial activity, or other pollutants into any waters of the United States except in compliance with the CWA;

That the Defendants be enjoined to undertake measures, at Defendants' own expense and at the direction of the EPA, to effect complete restoration of the site impacted by said violations and/or to conduct off-site mitigation for irreversible environmental damage, as appropriate;

That the Defendants be assessed pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), a civil penalty for each day of each violation of CWA sections 301(a), 308, and 309(a), 33 U.S.C. §§ 1311(a), 1318, and 1319(a);

That the United States be awarded costs and disbursements in this action; and

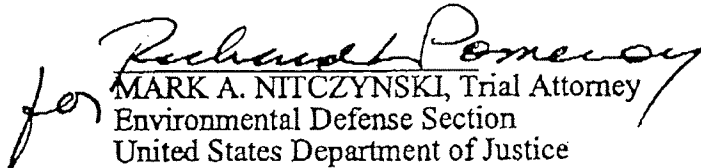
That this Court grant Plaintiff, the United States of America, such other relief as the

Court may deem just and proper.

Dated this 18th day of NOVEMBER 2005.

Respectfully submitted,

KELLY A. JOHNSON
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice


for MARK A. NITCZYNSKI, Trial Attorney
Environmental Defense Section
United States Department of Justice

TIMOTHY M. BURGESS
United States Attorney
District of Alaska

RICHARD L. POMEROY
Assistant U.S. Attorney

Attorneys for Plaintiff United States

OF COUNSEL:


DAVID ALLNUTT
U.S. Environmental Protection Agency
Seattle, Washington

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2005, I served true copies of the foregoing **Summons in a Civil Case** and **Second Amended Complaint** by the method(s) indicated below, postage prepaid, addressed to the following persons:

Darryl L. Thompson
841 I Street
Anchorage, AK 99501

☒ [X] Via Facsimile (907) 277-1373
☐ [] Via Overnight Mail (907) 272-8322
☒ [X] Via US Postal Service
☐ [] Via Hand Delivery


Charlotte Musser